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In the Supreme Court of the United States

October Term, 1973
No. 73-135

KING NUT COMPANY,
Petitioner,

vs.

BEER NUTS, INC.,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Your Petitioner, King Nut Company, respectfully prays that the Court reconsider its Order of October 9, 1973 denying the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, and grant the Petition.

As grounds for this Petition for Rehearing, the Petitioner respectfully requests the Court's consideration of the following:

The Petition for Writ of Certiorari stressed the injury to the rights of the Petitioner in being unjustly deprived, by the decision below, of Petitioner's legal right to label and sell its product by its accurate descriptive term of "beer nuts". This was analogous to depriving a merchant of the right to label and sell his coffee cake by its

descriptive term "coffee cake" (cake consumable with coffee), or to sell his tea biscuits by their descriptive term "tea biscuits" (biscuits consumable with tea), on the basis of a theory of estoppel by contract.

It appears that not enough emphasis was placed upon the deprivation of the *right of the consuming public* in purchasing products to have such products labeled and sold under their accurate descriptive terms. If a purchaser is to have a free choice in making its selection of products offered by several merchants, the purchaser should not meet the obstacle that one merchant may accurately describe his product in offering it for sale whereas, another merchant cannot serve the purchasing public by offering his equivalent product under the same accurate descriptive term.

To the extent that the purchasing public is thus deprived of its legal right to shop about among a plurality of sellers and freely to choose the product desired with the aid of the product being labeled and sold by its accurate descriptive term, trade in such product is being restrained. There is an interference with the free flow of commerce when purchasers cannot freely purchase, and sellers cannot freely offer, products through the assistance and guidance provided by all of the products being labeled by their true generic name, such as by the description of the natural and expected use of such products.

The public interest is involved here as well as the private interest of the Petitioner.

Specifically, in this case the purchasing public desiring to buy beer nuts (sweetened salted peanuts consumable with beer) is deprived of its right to buy from Petitioner its beer nuts labeled as "beer nuts". This provides a concrete example of a restraint on trade through the de-

vice of an estoppel based on contract. As pointed out in the Petition for Writ of Certiorari, such a theory of estoppel by contract *when it interferes with the rights of the public*, is contrary to law set forth in leading decisions of this Court, including the cases of

Lear Inc. v. Adkins, 395 U.S. 653, 89 S. Ct. 1902, 162 USPQ 1 (1969);

Scott Paper Co. v. Marcalus Mfg. Co., Inc., 326 U.S. 249, 66 S. Ct. 101, 67 USPQ 193 (1945).

The principle of those decisions indicates that the decision below was wrong and should be reversed on the grounds of sound public policy.

CONCLUSION

By reason of the foregoing, it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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and
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CERTIFICATE OF COUNSEL

I, Bruce B. Krost, counsel for the above named Petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

BRUCE B. KROST

CERTIORARI DENIED